A

B BRAUN MEDICAL INDUSTRIES SDN BHD v. MUGUNTHAN VADIVELOO

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
WONG KIAN KHEONG JCA
B NOORIN BADARUDDIN J
[CIVIL APPEAL NO: A-01(A)-590-08-2022]
12 JUNE 2024

C **Abstract** – *(i) When an employee alleges the existence of a forced mutual separation scheme agreement based on an employer's retrenchment or redundancy threat, the employee (not the employer) has the legal burden pursuant to s. 101(1) and (2) of the Evidence Act 1950 to prove the existence of a forced MSS contract on a balance of probabilities; (ii) an employer has the prerogative to restructure its* D *business in a bona fide manner.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash award of Industrial Court – Reviewing finding of facts – Whether execution of* E *mutual separation scheme ('MSS') contract based on redundancy threat amounted to unlawful dismissal – Whether employee has legal burden to prove forced MSS contract – Whether relevant matters considered – Whether irrelevant considerations taken into account – Whether company's restructuring bona fide – Whether award rational – Industrial Relations Act 1967, ss. 20(1), 29 & 30(5)*

F ***LABOUR LAW:*** *Industrial Court – Award – Reviewing finding of facts – Whether execution of mutual separation scheme ('MSS') contract based on redundancy threat amounted to unlawful dismissal – Whether employee has legal burden to prove forced MSS contract – Whether relevant matters considered – Whether irrelevant considerations taken into account – Whether company's restructuring bona fide – Whether award rational – Industrial Relations Act 1967, ss. 20(1), 29 & 30(5)*

G

LABOUR LAW: *Employment – Mutual separation scheme ('MSS') – Whether execution of MSS contract based on redundancy threat amounted to unlawful dismissal – Whether employee has legal burden to prove forced MSS contract – Whether relevant matters considered – Whether irrelevant considerations taken into* H *account – Whether company's restructuring bona fide – Whether award rational – Industrial Relations Act 1967, ss. 20(1), 29 & 30(5)*

This appeal concerned an allegation by an employee that his acceptance of a mutual separation scheme ('MSS') offered by his employer, (i) was forced by his employer under a threat that his job had become redundant and he I would be retrenched by his employer if he did not accept the MSS; and (ii) was actually his dismissal by the employer without just cause and excuse in the form of a forced resignation. The claimant commenced employment with the respondent company ('respondent') as a Senior Manager,

Commissioning and Maintenance in 2015. In 2018, the respondent faced financial problems. Due to this, the respondent explored certain restructuring measures including a reduction in the number of employees of the respondent. According to the claimant, in December 2018, he received a WhatsApp message from his immediate superior which stated, among others, that one Mr Ziegelaar had recommended for the claimant to take over the Facilities Division. On 14 January 2019, there was a meeting between the claimant, COW1 and COW2 at the Human Resources Department office ('first meeting'). The claimant was handed by COW1 a document of the respondent which showed two tables: (i) the first table showed the terms of a MSS which if accepted by the claimant, the respondent would pay to the claimant a total sum of RM125,566; (ii) the second table showed the terms of a 'retrenchment package' namely if the claimant was retrenched by the respondent, the claimant would only receive from the respondent a sum of RM41,053 as provided in the respondent's employee handbook. COW1 handed a draft MSS agreement to the claimant. According to the claimant, he was shocked by COW1's statements that his position in the respondent had become redundant and that this was a discussion on his exit package, as he had expected a discussion about his promotion. The claimant claimed he was given a choice to accept the draft MSS agreement or be retrenched by the respondent. The claimant requested for time to consider the draft MSS agreement. There was a second meeting on 14 January 2019 ('second meeting') where the claimant informed COW1 and COW2 that he accepted the draft MSS agreement with certain amendments. The claimant's amendments were accepted by the respondent and hence, a MSS agreement was prepared. The claimant then signed on the last page of the MSS agreement. COW1 informed the claimant that the MSS agreement had the effect of an ordinary resignation of his employment with the respondent. Later on the same day, 14 January 2019, the claimant met COW1 ('third meeting') to, among others, submit his resignation letter to COW1. The claimant's employment would cease on 1 May 2019. However, the claimant's WhatsApp message on 19 January 2019, applied for early release of the claimant from his employment with the respondent because the claimant had a job offer from another employer. The respondent agreed to the claimant's early release request (bilateral variation (MSS agreement)). Despite the claimant's failure to serve the three months' resignation notice period, the respondent still paid three months' salary to the claimant. After the respondent had restructured its operations, among others, COW4 was put in charge of the Plant Commissioning and Maintenance, which the claimant previously oversaw. The claimant made a representation under s. 20(1) of the Industrial Relations Act 1967 ('IRA') that he had been dismissed by the respondent without just cause or excuse, and the claimant's representation was referred to the Industrial Court ('IC'). After a hearing, the IC gave the following award: (i) the claimant had been dismissed by the respondent

without just cause or excuse; and (ii) the claimant was awarded a total sum of RM143,504.30. The respondent applied to the High Court for an order of *certiorari* to quash the award. The Judicial Commissioner ('JC') dismissed the respondent's judicial review application with costs. Hence, the respondent appealed to the Court of Appeal. The issues that arose were: (i) whether an employee could allege that his execution of the MSS contract (based solely on employer's redundancy threat) amounted to his unlawful dismissal by employer; (ii) who had the legal burden to prove the forced MSS contract (retrenchment threat); (iii) did the IC and the High Court considered relevant matters; (iv) whether the IC and the High Court had taken into account irrelevant considerations; (v) did the IC and the High Court erred in law by deciding that the respondent's restructuring was not *bona fide*; and (vi) was the award irrational.

Held (allowing appeal)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) In view of an employer's superior bargaining power *vis-à-vis* an employee, an employer may force an employee to enter into a MSS contract solely by threatening to retrench the employee if the employee does not agree to the MSS contract. In the case of a forced MSS contract (retrenchment threat), an employer's threat of retrenching an employee may itself cause an employee to sign a MSS contract involuntarily without any threat by the employer to dismiss the employee. Neither principle nor policy bars the court from recognising a forced MSS contract (retrenchment threat) as a dismissal of the employee without just cause or excuse within the meaning of s. 20(1) of the IRA. The court's recognition of a forced MSS contract (retrenchment threat) as an unlawful dismissal of an employee is in accordance with 'equity, good conscience and the substantial merits of the case' as mandated by s. 30(5) of the IRA. It is trite law that the IRA is a social legislation intended by Parliament to safeguard an employee's constitutional right to livelihood under art. 5(1) of the Federal Constitution. In the event of a forced MSS contract (retrenchment threat), an employee will be deprived of his or her constitutional right to livelihood. (para 34)

(2) When an employee alleges the existence of a forced MSS contract (retrenchment threat), the employee (not the employer) has the legal burden pursuant to s. 101(1) and (2) of the Evidence Act 1950 ('EA') to prove the existence of a forced MSS contract (retrenchment threat) on a balance of probabilities. Herein, the IC and the JC had failed to impose the legal burden under s. 101(1) and (2) of the EA on the claimant to prove on a balance of probabilities that the claimant had been forced by the respondent (through COW1 and COW2) at the three meetings to resign as the respondent's employee by executing the MSS agreement involuntarily. Such a failure amounted to an error of law. (paras 36 & 38)

(3) The claimant had requested time to consider the MSS; the respondent did not force the claimant to accept the draft (MSS agreement) there and then at the first meeting. At the second meeting, the claimant had proposed amendments to the draft MSS agreement which was accepted by the respondent. The claimant's resignation letter did not state that the claimant was forced to accept the MSS agreement due to the respondent's threat of retrenching him. In fact, the claimant, in the resignation letter, thanked 'all for the support' and wished the respondent 'all the best in the future.' The claimant's WhatsApp message amounted to an 'admission' by the claimant under ss. 17(1), 18(1) and 21 of the EA that he had signed the MSS agreement voluntarily. WhatsApp messages are admissible as evidence in legal proceedings. The claimant had requested for early release and for the respondent to confirm payment of the MSS sum in full despite the fact that the claimant did not serve the three months' resignation notice period. This was a case where an employer had 'walked the extra mile' by accommodating the claimant's requests. The seniority of the claimant's position in the respondent, his capability with regard to the negotiations (draft MSS agreement) and the bilateral variation (MSS agreement) were clearly relevant in the IC's determination of whether the claimant could discharge the legal burden under s. 101(1) and (2) of the EA to prove that he had been forced to sign the MSS agreement under a threat that the respondent would retrench him. The failure of the IC and the JC to take into account the relevant considerations constituted an error of law. (paras 39 & 40)

(4) Both the IC and the JC had considered two irrelevant matters (irrelevant considerations): (i) there was an offer of promise by the respondent to promote the claimant; and (ii) the respondent should have called one Lim (who prepared the respondent's document) to testify at the IC hearing regarding the contents of the respondent's document. Firstly, the contents of Mr Ziegelaar's WhatsApp message did not contain any promotion offer/promise nor was there any oral and/or documentary evidence adduced by the claimant to prove any promotion offer/promise. Secondly, this court failed to see how the evidence of Lim was relevant to the IC hearing as he was not present at the first meeting where the claimant alleged he had been threatened by COW1 that if he did not accept the MSS agreement, he would be retrenched by the respondent. Even if it was assumed that Lim's evidence was material in this case, the claimant could have compelled Lim to testify at the IC hearing under s. 29(b) and (c) of the IRA read with r. 16 of the Industrial Court Rules 1967. There was therefore no suppression of Lim's evidence by the respondent in this case. Both the IC and the JC had committed an error of law when they took into account the irrelevant considerations. (paras 41 & 42)

(5) An employer has the prerogative to restructure its business in a *bona fide* manner. The respondent's financial problems existed at the material time. Hence, the economic justification for the respondent's restructuring which was a lawful exercise of the employer's prerogative. The respondent's offer of MSS to the claimant was not a cloak to dismiss him unlawfully under a threat of retrenching him. The mere fact that the claimant's functions continued to exist after the completion of the respondent's restructuring did not *ipso facto* mean that the claimant's functions had become redundant and did not bar the respondent from restructuring its business in an economically feasible manner wherein another employee could carry out the claimant's functions at a lower cost to the respondent. In any event, the relevant considerations prove, on a balance of probabilities, that the claimant had voluntarily agreed to the MSS agreement. As such, once the claimant had failed to discharge the legal burden to prove the forced MSS contract (retrenchment threat) on a balance of probabilities, the claim should have been dismissed by the IC on this ground alone. (paras 43 & 44)

(6) The award was irrational. Thus, the decision of the High Court was set aside and a *certiorari* order was issued to quash the award. An IC Chairperson should be wary in deciding a claim for an unlawful dismissal (in the form of a forced resignation) by an employee who had willingly entered into a negotiated MSS contract with an employer and had received all the benefits under the concluded MSS contract. (paras 45 & 48)

Case(s) referred to:

Harpers Trading (M) Sdn Bhd, Butterworth v. Kesatuan Kebangsaan Pekerja-pekerja Perdagangan [1988] 2 ILR 314 ***(dist)***

Magendran Somasundram v. Kinetics Systems Malaysia Sdn Bhd [2022] ILRU 1742; [2022] 2 LNS 1742 ***(dist)***

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 10 CLJ 663 FC ***(refd)***

Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon [2023] 2 CLJ 34 CA ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Ng Wei Jye v. Kaspersky Lab Sea Sdn Bhd [2020] 2 ILR 432 ***(refd)***

Philips Electronics Supplies (M) Sdn Bhd/Philips Malaysia Sdn Bhd v. Ahmad Murad & Anor [2005] 3 ILR 786 ***(refd)***

PP v. Yuvaraj [1968] CLJU 116; [1968] 1 LNS 116 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Stanley Ng Peng Hon v. AAF Pte Ltd [1978] CLJU 186; [1978] 1 LNS 186 HC ***(dist)***

Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case [2017] CLJU 1648; [2017] 1 LNS 1648 HC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC ***(refd)***
VP Nathan & Partners v. Subramaniam Govindan Nair & Anor And Another Appeal [2009] 6 CLJ 673 CA ***(dist)***
Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] CLJU 258; [1998] 1 LNS 258 HC ***(refd)***
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***
Woo Vain Chan v. Malayawata Steel Bhd [2016] 10 CLJ 176 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 8(2), 17(1), 18(1), 21, 91, 92, 101(1), (2), 114(g)
Federal Constitution, art. 5(1)
Industrial Court Rules 1967, r. 16
Industrial Relations Act 1967, ss. 20(1), 29(b), (c), 30(5)

For the appellant - Raymond TC Low & Adam Thye Yong Wei; M/s Shearn Delamore & Co
For the respondent - VK Raj; M/s A Rajadurai P Kuppusamy & Co

[Editor's note: For the High Court judgment, please see B Braun Medical Industries Sdn Bhd v. Mugunthan Vadiveloo & Anor [2022] CLJU 2320; [2022] 1 LNS 2320 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong JCA:

Introduction

[1] This appeal concerned an allegation by an employee that his acceptance of a "mutual separation scheme" (MSS) offered by his employer:

(i) was "forced" by his employer under a threat that his job had become redundant and he would be retrenched by his employer if he did not accept the MSS; and

(ii) was actually his dismissal by the employer without just cause or excuse in the form of a "forced resignation".

Background

[2] We shall refer to parties as they were in the Industrial Court (IC).

[3] By way of a letter of appointment dated 21 April 2015, the claimant (claimant) commenced employment with the respondent company (respondent) on 1 June 2015 as a Senior Manager, Commissioning and Maintenance.

[4] In October 2018, the respondent had appointed Mr Andre Holzhaussen as its Senior Vice President.

[5] The respondent faced the following financial problems in 2018:

(i) compared to 2017, the respondent suffered a decline in sales of RM16 million due to difficult market conditions and "currency factors"; and

(ii) as a result of cost increase and inflationary pressure, the respondent recorded a lower "EBITA" (earnings before interest, taxes and amortisation) of RM35 million, a drop of 10.2% (compared to 2017)

(respondent's financial problems).

[6] Due to the respondent's financial problems, the respondent explored certain restructuring measures (respondent's proposed restructuring measures) including a reduction in the number of employees of the respondent (respondent's proposed reduction (employees)).

[7] The claimant and other management colleagues had objected to the respondent's proposed reduction (employees).

[8] In December 2018, the claimant met Mr Holzhaussen and presented slides on the claimant's proposal for the future development of the respondent's Facilities Division and Global Maintenance Organisation. Shortly after this presentation, the claimant received a WhatsApp message from his immediate superior, Mr Abram Francis Ziegelaar, which stated that, among others, Mr Ziegelaar had "recommended" to Mr Holzhaussen for the claimant to take over the Facilities Division (Mr Ziegelaar's WhatsApp message). We reproduce below Mr Ziegelaar's WhatsApp message:

> *I spoke to (Mr. Holzhaussen) today.*
>
> *Recommended you take over BF.*
>
> *Told him about what you are doing.*
>
> *I'll send you the slides so you can have consistent story.*
>
> (emphasis added)

[9] At approximately 11.30am, 14 January 2019, there was a meeting between:

(i) the claimant on the one part; and

(ii) Puan Sarina bt Ismail (COW1), the respondent's Director of Human Resources Department (HRD), and Encik Muhammed Aswadde Abdul Stek (COW2), an Assistant Manager of HRD, on the other part

– at HRD's office (first meeting (14 January 2019)).

[10] At the first meeting (14 January 2019):

(i) the claimant was handed by COW1 a document of the respondent, which showed two tables (respondent's document (two tables)). According to the respondent's document (two tables), among others:

(a) the first table on the left side of the respondent's document (two tables) showed the terms of a MSS, which if accepted by the claimant, the respondent would pay to the claimant a total sum of RM125,566 (equivalent to seven months' salary of the claimant); and

(b) on the right side of the respondent's document (two tables) was a second table which showed the terms of a "retrenchment package", namely, if the claimant was retrenched by the respondent, the claimant would only receive from the respondent a sum of RM41,053 (equivalent to 2.29 months' salary of the claimant) as provided in the respondent's "employee handbook";

(ii) COW1 handed a draft MSS agreement (draft (MSS agreement)) to the claimant;

(iii) there was a conflict in the testimonies in the IC between the claimant on the one part and COW1 and COW2 on the other part as follows:

(a) according to the claimant, among others:

(1) the claimant was informed by COW1 that the claimant's position in the respondent had become redundant and the first meeting (14 January 2019) was called to discuss his exit package;

(2) the claimant was shocked by COW1's statements as he had expected a discussion about his promotion; and

(3) the claimant was given a choice to accept the draft (MSS agreement) or be retrenched by the respondent;

(b) COW1 and COW2 gave the following evidence, among others:

(1) COW1 explained to the claimant regarding the respondent's proposed restructuring measures which included a MSS;

(2) COW1 invited the claimant to consider accepting the draft (MSS agreement);

(3) the claimant was given an opportunity to read the draft (MSS agreement) and to ask questions regarding the effect of the draft (MSS agreement);

(4) the claimant was informed by COW1 that if he agreed to a MSS, he would be allowed to go on leave immediately and need not come to the office thereafter; and

(5) neither COW1 nor COW2 had informed the claimant that his position in the respondent had become redundant. COW1 and COW2 did not inform or threaten the claimant that if he did not accept the MSS, his employment with the respondent would be terminated;

(iv) with regards to the draft (MSS agreement), the claimant requested three matters from the respondent (claimant's three requests (draft MSS agreement)), namely:

(a) the claimant requested to serve a three months' resignation notice period from 1 February 2019 to 30 April 2019 (claimant's first request (draft MSS agreement)). The claimant's first request (draft MSS agreement) was made because the claimant had to seek new employment (if he agreed to the MSS) and prospective employers would usually require three months of pay slips;

(b) the claimant requested for the respondent to pay tax for the respondent's *ex gratia* payment of four months' salary pursuant to the draft (MSS agreement) (claimant's second request (draft MSS agreement)); and

(c) the claimant requested for the respondent to pay "employee's incentive program" bonus (EIP bonus) to the claimant (claimant's third request (draft MSS agreement));

(v) COW1 informed the claimant that the respondent would accept the claimant's first and second requests (draft MSS agreement). According to COW1, the respondent could not confirm the claimant's third request (draft MSS agreement) because at the time of the first meeting (14 January 2019), the respondent had not announced the pay-out for the EIP bonus for the year 2018; and

(vi) the claimant requested for time to consider the draft (MSS agreement) (claimant's request (time to consider MSS agreement)). COW1 acceded to the claimant's request (time to consider MSS agreement). Consequently, the first meeting (14 January 2019) had concluded at about 12.30pm, 14 January 2019.

[11] Between 1 to 2pm on 14 January 2019, there was a second meeting between the claimant, COW1 and COW2 (second meeting (14 January 2019)). At the second meeting (14 January 2019):

(i) the claimant informed COW1 and COW2 that he accepted the draft (MSS agreement) with four amendments (claimant's four amendments (draft MSS agreement));

(ii) the claimant's four amendments (draft MSS agreement) were accepted by the respondent. Hence, a MSS agreement was prepared based on the claimant's four amendments (draft MSS agreement);

(iii) the claimant was given an opportunity to read the MSS agreement;

(iv) COW1 asked the claimant whether he had any questions regarding the MSS agreement. As the claimant had no questions regarding the MSS agreement, the claimant signed on the last page of the MSS agreement, *ie*, p. 8. The claimant also initialled at the bottom right side of pp. 1 to 7 of the MSS agreement;

(v) COW1 informed the claimant that the MSS agreement had the effect of an ordinary resignation of his employment with the respondent; and

(vi) the claimant informed COW1 that he would subsequently return to the HRD office between 4.30 and 5pm on 14 January 2019 to, among others, submit his resignation letter to COW1.

[12] Between 4.30pm and 5.15pm on 14 January 2019, the claimant met COW1 at the HRD office (third meeting (14 January 2019)) to, among others, submit his resignation letter to COW1 (claimant's resignation letter). The claimant's resignation letter stated as follows:

> **Resignation from the post of Senior Manager: Plant Commissioning and Maintenance Support**
>
> *Referring to the above matter, I would to [sic] tender my resignation as of 2019-01-14. I would like to serve my 3 months' notice until the 2019-04-30.*
>
> *I wish to thank all for the support and wish [Respondent], all the best in the future.*
>
> (emphasis added)

[13] This judgment shall henceforth refer to the first meeting (14 January 2019), second meeting (14 January 2019) and third meeting (14 January 2019) collectively as the "three meetings (14 January 2019)".

[14] On 15 January 2019, the claimant sent the following WhatsApp message to COW1 (claimant's WhatsApp message (15 January 2019)):

> *hi sarina, rumors are going around that I am terminated [sic] so I sent the message to my team. Below is my message to them*
>
> *Hi guys,*
>
> *Pls help to stop spreading rumors that I am terminated [sic]. I have submitted my resignation to [Mr. Ziegelaar] yesterday and decided that I can leave earlier. I am still an active employee of [Respondent] till 30th April 2019. (Ms. Poh can check on this this). However, i [sic] am on garden leave till then. Any info you guys needs [sic], can get back to me. Thanks.*
>
> Regards,
>
> [Claimant] (emphasis added)

[15] The claimant sent a WhatsApp message to COW1 on 19 January 2019 (claimant's WhatsApp message (19 January 2019)). According to the claimant's WhatsApp message (19 January 2019):

A *Hi [COW1],*

Can i [sic] opt for release? I have got an offer from another company? Ask me to join on February. If you are ok, i [sic] can come down to penang to re-sign the agreement and settle things? (emphasis added)

B In accordance with the claimant's first request (draft MSS agreement), cl. 1.1 of the MSS agreement provided that the claimant's employment with the respondent would cease on 1 May 2019. However, the claimant's WhatsApp message (19 January 2019) applied for an "early release" of the claimant from his employment with the respondent because the claimant had a job offer from another employer (claimant's early release request).

C **[16]** COW1 replied to the claimant's early release request by asking for the date which the claimant would want to be released from the respondent's employment before 1 May 2019 (date (claimant's early release)).

[17] On 22 January 2019, the claimant sent a WhatsApp message to D COW1, which stated as follows, among others:

(i) the claimant would "confirm" the date (claimant's early release) when he received the "offer letter" from his new employer; and

(ii) the claimant wanted the respondent to confirm that notwithstanding the early release of the claimant from his employment with the respondent:

E

(a) the respondent would still pay the claimant his salary for January 2019;

(b) the respondent would still pay the net sum of RM125,566 (MSS sum) to the claimant, namely, the respondent would bear the tax for

F the MSS sum; and

(c) the claimant's EIP bonus would be paid by the end of February, 2019

(claimant's WhatsApp message (22 January 2019)).

G **[18]** COW1 replied to the claimant's WhatsApp message (22 January 2019) by stating the following:

(i) if the claimant could "confirm" to the respondent by 24 January 2019 that the date (claimant's early release) would be 31 January 2019, the

H respondent would pay the MSS sum on 31 January 2019;

(ii) the respondent would bear the tax for the MSS sum; and

(iii) the respondent could not confirm regarding the claimant's EIP bonus.

[19] A meeting between the claimant and COW1 took place on 29 January I 2019 (meeting (29 January 2019)). At the meeting (29 January 2019):

(i) the respondent agreed to the claimant's early release request; and

(ii) the date (claimant's early release) would be 31 January 2019

(bilateral variation (MSS agreement)).

[20] Both the claimant and COW1 made a note on the claimant's resignation letter regarding the bilateral variation (MSS agreement) (accepted for early release as at 31 January 2019) (claimant's early release note (claimant's resignation letter)). The claimant and COW1 signed below the claimant's early release note (claimant's resignation letter).

[21] Despite the claimant's failure to serve the three months' resignation notice period, the respondent still paid three months' salary to the claimant.

[22] Before the respondent's restructuring and the claimant's resignation by way of the MSS agreement, the claimant's job oversaw two functions, namely:

(i) in the "Technical Services-Building Technology" Unit (BT Unit), the claimant was responsible to oversee "Plant Commissioning and Maintenance"; and

(ii) the "Facilities Management-Building Facilities" Unit (BF Unit) has the following two portfolios:

(a) "Commercial Management" was under the purview of Mr Song Chee Meng, the respondent's Senior Manager (COW4); and

(b) the claimant was in charge of "Maintenance Technical".

[23] After the respondent had restructured its operations (respondent's restructuring), among others:

(i) the BT Unit was phased out to the BF Unit;

(ii) COW4 was put in charge of Plant Commissioning and Maintenance; and

(iii) the Maintenance Technical in the BF Unit was merged with "Cost Control" in the BF Unit to form "Facility Management" under the purview of COW4.

Proceedings In IC

[24] The claimant made a representation under s. 20(1) of the Industrial Relations Act 1967 (IRA) that he had been dismissed by the respondent without just cause or excuse (claimant's representation). The claimant's representation was subsequently referred to the IC.

[25] After a hearing conducted by the learned IC Chairman (IC hearing), the IC gave the following award (award):

(i) the claimant had been dismissed by the respondent without just cause or excuse; and

(ii) the claimant was awarded a total sum of RM143,504.30, which was computed as follows:

(a) backwages for 12 months (RM17,938 x 12 months)	RM215,256
(b) deduct the respondent's payment of MSS sum (RM125,566)	– RM89,690
(c) compensation *in lieu* of reinstatement (RM17,938 x 3 months)	RM53,814
Total compensation	RM143,504.30

[26] The following reasons, among others, were given by the learned IC Chairman in the award:

(i) the respondent had the burden to prove the redundancy of the claimant's employment so as to justify the MSS agreement – paras. 35 to 37, 40, 41, 46, 52, 55 and 60 award; and

(ii) the respondent failed to discharge the burden to prove that the claimant's employment had become redundant because:

(a) prior to the first meeting (14 January 2019), the claimant was "offered" a promotion – paras. 47 and 49 to 51 award;

(b) the respondent intended to terminate the claimant's employment on the grounds of redundancy when the claimant was shown the respondent's document (two tables) – paras. 42 to 48, 52 and 53 award;

(c) the respondent's document (two tables) was prepared by Ms Lim Ai Kim (Ms Lim), an employee of the respondent. The respondent should have called Ms Lim as a witness in the IC hearing – para. 54 award;

(d) the respondent failed to explain to the claimant that he had an option to refuse the MSS without being retrenched by the respondent – para. 55 award; and

(e) the claimant's role, functions and responsibilities continued to exist after:

(1) the cessation of the claimant's employment with the respondent; and

(2) the respondent's restructuring

– paras. 58 and 59 award.

Respondent's Judicial Review Application In High Court

[27] The respondent applied to the High Court for an order of *certiorari* to quash the award (respondent's judicial review application).

[28] The learned Judicial Commissioner (as he then was) dismissed the respondent's judicial review application with costs (High Court's decision). Consequently, the respondent appealed to the Court of Appeal against the High Court's decision (this appeal).

[29] According to the written judgment of the High Court (High Court's judgment), among others:

(i) there were only two issues in the respondent's judicial review application, namely:

  (a) whether the claimant had voluntarily accepted the MSS – para. 31 High Court's judgment; and

  (b) if the claimant had not voluntarily accepted the MSS and there was thus a dismissal of the claimant by the respondent, whether the IC had applied the correct legal principles regarding redundancy by not finding that the claimant's dismissal was excused by the respondent's restructuring – para. 32 High Court's judgment;

(ii) the learned IC Chairman was "not plainly wrong" in making findings of fact that the respondent had dismissed the claimant – paras. 2 and 40 to 45 High Court's judgment;

(iii) the respondent had "earmarked" the claimant for promotion – paras. 2, 42 and 45 High Court's judgment;

(iv) the respondent's submission that the IC had erred in applying the wrong burden of proof with regards to the MSS (by erroneously imposing the onus on the respondent to justify the MSS) was "without merit" – para. 46 High Court's judgment;

(v) "it was perfectly in order" for the learned IC Chairman to hold adversely against the respondent for not calling Ms Lim to explain the respondent's document (two tables) to the claimant against the "backdrop of (the claimant) being earmarked for promotion" – para. 45 High Court's judgment;

(vi) with regards to the issue of whether the claimant's dismissal was justified by the respondent's restructuring, the following factual findings of the IC were not "plainly wrong":

  (a) the respondent's restructuring was not *bona fide* – paras. 51, 52 and 59 to 63 High Court's judgment; and

(b) the job functions of the claimant were still required at the time of his dismissal by the respondent – paras. 53 to 58 High Court's judgment; and

(vii) the respondent failed to discharge the burden to prove that the claimant's job functions had become redundant – para. 56 High Court's judgment.

Issues

[30] The following questions will be decided in this appeal:

(i) if:

(a) an employee (X) had been forced to sign a MSS contract with X's employer (Y) under Y's threat that:

(1) X's employment had become redundant; and

(2) Y would retrench X if X did not agree to the MSS contract; and

(b) Y had not threatened to dismiss X from employment;

(a) whether the court can decide that X's execution of the MSS contract constituted a dismissal of X by Y without just cause or excuse in the form of a "forced resignation". This is a novel issue as we are unable to find any previous Malaysian case which has decided on this point;

(ii) in the factual circumstances as stated in the above sub-para. (1):

(a) whether Y bears the legal burden under s. 101(1) and (2) of the Evidence Act 1950 (EA) to prove on a balance of probabilities that X had signed the MSS contract voluntarily and, consequently, X had not been unlawfully dismissed by Y by way of a forced resignation; or

(b) does X have to discharge the legal burden to prove on a balance of probabilities that X had been "forced" to resign as Y's employee by executing the MSS contract involuntarily and as such, X had been unlawfully dismissed by Y?

The above issue also concerns a discussion of ss. 91, 92 and proviso (a) to s. 92 of the EA;

(iii) whether the IC and High Court had committed the following error(s) of law:

(a) failure to take into account the following relevant facts:

(1) negotiations between the claimant and respondent regarding the draft (MSS agreement), which led to the execution of the MSS agreement (negotiations (draft MSS agreement));

(2) the claimant's request (time to consider MSS), which had been accepted by the respondent;

(3) the claimant's resignation letter;

(4) the claimant's WhatsApp message (15 January 2019), which amounted to an "admission" by the claimant under ss. 17(1), 18(1) and 21 of the EA that he had signed the MSS agreement voluntarily;

(5) the claimant's early release request, which led to the bilateral variation (MSS agreement); and

(6) the claimant's conduct (relevant under s. 8(2) of the EA), which did not send any demand, letter, email or WhatsApp message to the respondent and/or COW1 regarding his forced resignation by way of the MSS agreement;

(b) consideration of irrelevant matters, namely:

(1) there was an "offer" or promise by the respondent to promote the claimant; and

(2) Ms Lim should have been called by the respondent to testify at the IC hearing regarding the contents of the respondent's document (two tables); and

(c) when the learned IC Chairman and Judicial Commissioner had decided that the respondent's restructuring was not *bona fide*;

(iv) was the award so irrational or unreasonable that no reasonable IC Chairperson would have made the award?; and

(v) whether the learned Judicial Commissioner had committed an error of law in applying the "plainly wrong" test (applicable in appeals against lower courts' decisions after trial) in a judicial review application.

Grounds For Judicial Review

[31] It is not disputed that a *certiorari* order may be issued by the court to quash an IC's award in either one of the following two circumstances:

(i) if an error of law has been committed by the IC. We rely on the following judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, at 765:

> *In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public*

decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law. (emphasis added); or

(ii) if an award of the IC is "irrational" in the sense that no reasonable IC Chairperson would have decided in the way it was arrived at by the IC Chairperson – please refer to the judgment of Raus Sharif FCJ (as he then was) in the Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629, at [15].

Whether An Employee Can Allege That His Execution Of MSS Contract (Based Solely On Employer's Redundancy Threat) Amounts To His Unlawful Dismissal By Employer

[32] The respondent's learned counsel submitted that COW1 did not threaten to dismiss the claimant at the first meeting (14 January 2019). Hence, there could not be a forced resignation of the claimant by the respondent. Reliance had been placed by the respondent's learned counsel on the following four cases:

(i) an award of the IC in *Harpers Trading (M) Sdn Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Perdagangan* [1988] 2 ILR 314;

(ii) the decision of Choor Singh J in the Singapore High Court case of *Stanley Ng Peng Hon v. AAF Pte Ltd* [1978] CLJU 186; [1978] 1 LNS 186; [1979] 1 MLJ 57;

(iii) the judgment of the Court of Appeal delivered by Low Hop Bing JCA in *VP Nathan & Partners v. Subramaniam Govindan Nair & Anor And Another Appeal* [2010] 6 CLJ 673; [2011] 5 MLJ 2009; and

(iv) the award of IC Chairperson Suraiya binti Mustafa Kamal in *Magendran Somasundram v. Kinetics Systems Malaysia Sdn Bhd* [2022] ILRU 1742; [2022] 2 LNS 1742.

[33] Firstly, the above four cases cited by the respondent's learned counsel did not concern an employee being forced by an employer to agree to a MSS contract by way of a threat that the employee's job had become redundant

and the employer would retrench the employee if the employee did not sign the MSS contract. In other words, all the cases cited by the respondent's learned counsel can be easily distinguished from this appeal.

[34] Secondly, we are of the view that if:

(i) an employee had been forced to agree to a MSS contract with his or her employer under a threat by the employer that:

(a) the employee's employment had become redundant; and

(b) the employer would retrench the employee if the employee did not agree to the MSS contract; and

(ii) the employer had not threatened to dismiss the employee:

the court can decide that the employee's execution of the MSS contract constituted a dismissal of the employee by the employer without just cause or excuse in the form of a "forced resignation". This decision is supported by the following reasons:

(a) in view of an employer's superior bargaining power *vis-à-vis* an employee, an employer may force an employee to enter into a MSS contract solely by threatening to retrench the employee if the employee does not agree to the MSS contract (forced MSS contract (retrenchment threat)). In the case of a forced MSS contract (retrenchment threat), an employer's threat of retrenching an employee may in itself cause an employee to sign a MSS contract involuntarily without any threat by the employer to dismiss the employee;

(b) neither principle nor policy bars the court from recognising a forced MSS contract (retrenchment threat) as a dismissal of the employee without just cause or excuse within the meaning of s. 20(1) of the IRA. Section 20(1) of the IRA states as follows:

> **s 20. Representations on dismissals**
>
> (1) *Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment;* the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (emphasis added)

(c) s. 30(5) of the IRA provides as follows:

> *The [IC] shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.* (emphasis added)

The court's recognition of a forced MSS contract (retrenchment threat) as an unlawful dismissal of an employee is in accordance with "equity, good conscience and the substantial merits of the case" as mandated by s. 30(5) of the IRA; and

(d) it is trite law that the IRA is a "social legislation" intended by Parliament to safeguard an employee's constitutional right to livelihood under art. 5(1) of the Federal Constitution (social objective (IRA)) – please refer to the judgment of Nallini Pathmanathan FCJ in the Federal Court in *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2021] 10 CLJ 663; [2021] MLJU 2189, at [39] and [40]. The above decision is in consonance with the social objective (IRA). If otherwise, in the event of a forced MSS contract (retrenchment threat), an employee will be deprived of his or her constitutional right to livelihood.

Who Has Legal Burden To Prove Forced MSS Contract (Retrenchment Threat)?

[35] We reproduce below the relevant parts of ss. 91, 92 and 101 of the EA:

> s 91. *Evidence of terms of contracts,* grants and other dispositions of property *reduced to form of document*
>
> *When the terms of a contract* or of a grant or of any other disposition of property *have been reduced by or by consent of the parties to the form of a document,* and in all cases in which any matter is required by law to be reduced to the form of a document, *no evidence shall be given in proof of the terms of the contract,* grant or other disposition of property or of the matter *except the document itself,* or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> s 92. *Exclusion of evidence of oral agreement*
>
> *When the terms of any such contract,* grant or other disposition of property, or any matter required by law to be reduced to the form of a document, *have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:*
>
> *Provided that:*
>
> (a) *any fact may be proved which would invalidate any document* or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law; …

s 101. *Burden of proof*

(1) *Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.* (emphasis added)

[36] When an employee alleges the existence of a forced MSS contract (retrenchment threat), we decide that the employee (not the employer) has the legal burden pursuant to s. 101(1) and (2) of the EA to prove the existence of a forced MSS contract (retrenchment threat) on a balance of probabilities. Our reasons are as follows:

(i) the following four cases have decided that if an employee alleges that his or her resignation was due to the employer's threat of dismissal (forced resignation (dismissal threat)), the employee (not the employer) has the legal burden to prove the forced resignation (dismissal threat) on a balance of probabilities:

(a) in the High Court case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] CLJU 258; [1998] 1 LNS 258; [1998] 7 MLJ 359, at 362 and 363 to 364, Abdul Kadir Sulaiman J (as he then was) has held as follows:

> *By her statement of case, the first respondent avers that she worked for the applicant as a supervisor.* In early 1993, the applicant summarily ordered her to be a 'sample sewer'. The applicant was not satisfied with her production capacity and required of her to produce more to be commensurate with her salary paid by the company. *Later, the applicant forced her into signing a printed letter of resignation to take effect from 5 June 1995 marked as exh C-1. Therefore, she claimed that she was dismissed from her job with the applicant from that effective date and that this dismissal was without just cause or excuse, and contrary to the principles of natural justice and an unfair labour practice. She, therefore, claims for reinstatement as a supervisor without loss of any benefit monetary or otherwise. The applicant denies in the statement in reply of the fact of the dismissal and avers that the first respondent on her own volition tendered her resignation from the service of the company on 5 June 1995.*
>
> *Therefore, in the light of the pleadings, it is for the first respondent to prove on the balance of probability that she was being dismissed from the service by the applicant and that exh C-1 was forced upon her by the applicant against her will. …*
>
> …
>
> *Next is the burden of proof on the issue of forced resignation raised by the first respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the (IRA),*

all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise, the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise (see Wong Chee Hong v. Cathay Organization (M) Sdn Bhd [1988] 1 MLJ 92). In the present case, it is the first respondent who asserts that she was dismissed and the applicant denies it. So, it is for the first respondent to establish so by the evidence. From the evidence before the learned chairman, can it be said that the applicant by its conduct had placed the first respondent in a position in which she really has no option but to tender her resignation for an inference to be drawn that she is dismissed by the applicant? I do not think so. The applicant was no doubt unhappy with her performance by asking her to improve. So it is up to the first respondent to see that her performance improved or leave the company. On the facts, she chose the latter without any threat by the applicant to dismiss her for her poor performance. However, in her pleading before the Industrial Court, she avers that the production manager of the applicant intimidated and threatened her and forced her to sign a printed letter of resignation supplied to her. Hence, her reason for saying that it was a dismissal and that it was so done without just cause or excuse. The learned author, Prof SB Rao in his book entitled Cases and Material on Resignation, Transfer and Suspension at p 28 quoted the following passage from Tata Robinson Fraser Co Ltd v. Labour Court 1989-II-LLJ 443:

> *To make out a case that his resignation was not voluntary and his resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that he was not allowed time to think over the matter, not allowed to come out of the office but was physically restrained and he had signed under protest.*

However, in the present case, there was no evidence for the first respondent to the like effect bearing in mind the burden is on her to establish the allegation to enable an inference in her favour be made. Also, s. 101 (EA), puts such a burden on the first respondent. She did not deny that exh C-1 contains her signature. In the light of the applicant's denial of a forced resignation being imposed upon her, the burden is on her to establish her allegation over the matter. This she had failed. Hence, the conclusion arrived at by the learned chairman in the impugned award that there was such a dismissal has resulted in an error of law having been committed by her. (emphasis added)

(b) *Weltex Knitwear Industries* has been affirmed by Lee Swee Seng JCA in the Court of Appeal case of *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 CLJ 34; [2023] 1 MLJ 880, at [67]. We will discuss the effect of *Matrix Global Education* in sub-para. 39(i) below;

(c) according to Chairlady Soo Ai Lin in *Philips Electronic Supplies (M) Sdn Bhd/Philips Malaysia Sdn Bhd v. Ahmad Murad & Anor* [2005] 3 ILR 786, at 788 and 789:

> *In their joint statement of case, the claimants contended that they did not sign their letter of resignation voluntarily but that they were forced and threatened by their superiors into resigning failing which disciplinary action would be taken against them and that they would be dismissed. They further contended before this court that they were also induced to tender their resignation. They claimed that the company's actions were tantamount to a dismissal of them with effect from 30 September 1998 without just cause or excuse.*
>
> *The company denied that it had pressured the claimants to resign. …*
>
> …
>
> *It is settled law in industrial jurisprudence that a forced resignation is no resignation but a dismissal in fact. Choor Singh J in Stanley Ng Peng Han v. AAF Pte. Ltd [1979] 1 MLJ 57 held that a resignation obtained under compulsion is no resignation in law. Elaborating further, His Lordship said:*
>
> > *It will be clear that the underlying basis of the doctrine of "forced resignation" is the existence of facts showing that an employee was put under compulsion to resign and that if he declined to do so, the employer would proceed to dismiss him in any event.*
> >
> > …
>
> *Based on the foregoing and in view of the respective contentions of the parties, the court's primary duty in this case is to determine exactly what caused or motivated the claimants into resigning from their employment, ie. the actual causation factor. The burden of proof undoubtedly is on the claimants to establish by cogent evidence that their resignation was procured in such circumstances as to tantamount to a dismissal by forced resignation. Mere allegation, vague suggestions and insinuations are not enough. For it is a rule of evidence that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not the party who denies it. (See Food Specialities (M) Sdn. Bhd. v. M. Halim bin Manap @ Abd. Manaf [1992] 2 ILR 311; CityLink Express (M) Sdn. Bhd. v. Greenson Dauk [2002] 3 ILR 1219.)* (emphasis added);

(d) in *Ng Wei Jye v. Kaspersky Lab Sea Sdn Bhd* [2020] 2 ILR 432, at [15] and [16], Chairlady Noor Hayati Mat followed *Weltex Knitwear Industries* and *Philips Electronic Supplies*.

If an employee who alleges the existence of a forced resignation (dismissal threat), has the legal burden under s. 101(1) and (2) of the EA to prove the forced resignation (dismissal threat) on a balance of probabilities, we do not see any reason why an employee who complains of a forced MSS contract (retrenchment threat) should not

A have the legal burden to prove the forced MSS contract (retrenchment threat) on a balance of probabilities. There should not be any distinction between a forced resignation (dismissal threat) and a forced MSS contract (retrenchment threat) because in both cases, the crux is the same, namely, whether the employee's B resignation is voluntary or otherwise;

(ii) the above decision is in consonance with ss. 91, 92 and proviso (a) to s. 92 of the EA as follows:

(a) as explained by Chang Min Tat FJ in the Federal Court case of C *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229, at 232 to 233, upon the execution of a written MSS contract, ss. 91 and 92 of the EA bar both the employee and employer who have signed the MSS contract from adducing any evidence to:

D (1) contradict;

(2) vary;

(3) add to; or

(4) subtract from

E – the contents of the MSS contract.

It is to be emphasised that our EA, despite its name, is a code of law which is intended by the Legislature to be comprehensive – please refer to the Privy Council's opinion delivered by Lord Diplock on appeal from Malaysia in *PP v. Yuvaraj* [1968] CLJU 116; [1968] F 1 LNS 116; [1969] 2 MLJ 89, at 90; and

(b) an employee can only adduce evidence to invalidate the MSS contract pursuant to proviso (a) to s. 92 of the EA. Accordingly, the legal burden to prove a forced MSS contract (retrenchment threat) so as to invalidate the MSS contract pursuant to proviso (a) to s. 92 G of the EA, lies with the employee and not the employer; and

(iii) if the court has imposed the legal burden under s. 101(1) and (2) of the EA on an employer to prove on a balance of probabilities that an employee had signed the MSS contract voluntarily and was not H consequently dismissed by way of a forced MSS contract (retrenchment threat):

(a) this will render redundant the effect of the codified provisions in ss. 91, 92 of the EA and proviso (a) to s. 92 of the EA;

I (b) the freedom of employees and employers to enter into MSS contracts will be undermined; and

(c) the sanctity of concluded MSS contracts will be eroded.

[37] Needless to say, whether an employee can discharge the legal burden under s. 101(1) and (2) of the EA to prove that the employee had been forced by an employer to resign depends on the particular facts of the case in question. Accordingly, cases which have decided that there were forced resignations or otherwise, cannot be binding precedents from the viewpoint of the doctrine of *stare decisis*.

[38] With respect, both the learned IC Chairman and Judicial Commissioner had failed to impose the legal burden under s. 101(1) and (2) of the EA on the claimant to prove on a balance of probabilities that the claimant had been forced by the respondent (through COW1 and/or COW2) at the three meetings (14 January 2019) to resign as the respondent's employee by executing the MSS agreement involuntarily. Such a failure amounted to an error of law (first legal error (IC and HC)).

Did IC And High Court Consider Relevant Matters?

[39] We accept the submission of the respondent's learned counsel that both the learned IC Chairman and Judicial Commissioner had failed to take into account the following relevant considerations in this case (relevant considerations):

(i) in the first meeting (14 January 2019), the negotiations (draft MSS agreement) had taken place between the claimant and respondent (through COW1) as follows:

(a) the claimant's three requests (draft MSS agreement) had been made to the respondent on the claimant's own volition;

(b) the respondent had accepted the claimant's first and second requests (draft MSS agreement); and

(c) the claimant's third request (draft MSS agreement) was not rejected outright by the respondent. Instead, the respondent stated that at the time of the first meeting (14 January 2019), the respondent had not announced the payout for the EIP bonus.

The above conduct of both the claimant and respondent with regards to the negotiations (draft MSS agreement) is relevant under s. 8(2) of the EA, which read as follows:

> *The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto,* and the conduct of any person an offence against whom is the subject of any proceeding, *is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.* (emphasis added)

The relevance of the negotiations (draft MSS agreement) has been explained in *Matrix Global Education*, at [11] to [17], [66], [67], [71], [72] to [75], [93] and [94], as follows:

> *[11] Meanwhile the appellant company received information that the respondent was involved in certain irregularities during his tenure as CEO of MGS. This placed further concerns in respect of the respondent's suitability of employment within the company.*
>
> *[12] In the light of the aforesaid, the appellant, through Tuan Hj Mohammad Nor, had immediately on 13 February 2018 notified the respondent via WhatsApp message of the withdrawal of the offer letter dated 6 February 2018. The respondent was also advised to resign and was informed that he would be given six months' salary in lieu of the notice.*
>
> *[13] The respondent entered into a negotiation with the appellant to achieve a better severance package for his resignation. The respondent then issued another email dated 28 February 2018 wherein he boldly requested for 12 months' salary in lieu and for the appellant's car ownership scheme ('COS') to be deemed fully executed.*
>
> *[14] Soon after that, a meeting was held on 2 March 2018 between Tuan Hj Mohammad Nor and the respondent wherein the former informed the respondent that in the event the respondent opted to resign, he would be paid six months' salary in lieu.*
>
> *[15] The respondent wrote an email dated 2 March 2018 to the appellant wherein he tendered his resignation as CEO of the appellant and in language both warm and cordial, he also further thanked the appellant for the opportunity to work with them and expressed his intentions to assist MGS, if need be in the future. It was what one would reasonably expect in a voluntary parting of ways where courtesy and commendation would be the sweet aroma of separation.*
>
> *[16] The appellant company by its letter of 5 March 2018 accepted the respondent's resignation and informed him that his last date of employment was on 3 March 2018. The appellant committed itself in writing as negotiated that as a result of his resignation, the respondent would be granted the following:*
>
> *(a) six months' salary in lieu of notice;*
>
> *(b) full waiver of his child's tuition fees with MIS until completion of the remaining academic term; and*
>
> *(c) restructuring of the COS in order to allow the respondent an additional three months to repay the car loan under the COS.*
>
> *[17] The appellant company honoured what had been agreed. The six months' salary in lieu of notice was paid by the appellant to the respondent. The respondent received the benefit of a full waiver of his child's tuition fees with MIS until the remaining of the academic term and the repayment of the car loan was restructured.*
>
> …

[66] What is more pertinent and indeed pivotal in this case is whether both the High Court and the Industrial Court had failed to consider the relevant fact that the respondent, prior to his resignation, had entered into negotiations with the appellant to discuss a better severance package.

[67] In order to prove a claim of forced resignation, it was incumbent upon the respondent and the burden is on him to adduce evidence to show that he was placed in a position where he was forced to resign, failing in which, he would be dismissed unlawfully. This principle, as pointed out by the appellant, was outlined by the High Court in the case of Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1988] 7 MLJ 359 as follows:

…

[71] What is not disputed here is that there was a suggestion from the appellant company that the respondent should consider resigning in the light of the numerous complaints by parents on the quality of teaching and education and the company having to refund the fees paid to the parents to the tune of more than RM1m for that academic year. It cannot be denied as it had become fiat accompli that, upon the suggestion of resignation being raised, the respondent had entered into negotiations with the appellant for a better severance package. …

…

[72] The conduct of the respondent in entertaining and entering into negotiations for settlement on terms does not sit snugly and indeed cannot support what he later asserted in the statement of case and at the Industrial Court that he had been constructively dismissed.

[73] The respondent cannot have the best of both worlds; negotiating and accepting the terms of a separation and then at the same time claiming that he had been constructively dismissed. He cannot have the cake and eat it; entering into a negotiated settlement without reservation of rights and then launching a claim for more on account of being constructively dismissed.

[74] If the respondent as claimant in the Industrial Court is so certain that the narrated actions of the appellant company are so connected with one another as to culminate in a repudiation of the employment contract, then he must show and be seen to have dissociated and distanced himself from the actions of the company and to forthwith walk out of the employment and treat himself as being constructively dismissed.

[75] A mere suggestion, advice or option to resign is not conclusive of constructive dismissal or forced resignation. The higher one is in the employment ladder and here we are talking about the top executive position of a CEO just below that of the managing director or executive director, the higher the test that one has been forced to resign.

…

[93] It cannot be over emphasised that a resignation made pursuant to a series of negotiations completely negates the allegations of forced resignation as upheld by the Employment Appeal Tribunal in the case of Sheffield v. Oxford Controls Co Ltd [1979] ICR 396 as follows:

> *In cases such as that which we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory. Therefore, we think that the finding that Mr Sheffield had agreed to terms upon which he was prepared to agree to terminate his employment with the company – terms which were satisfactory to him – means that there is no room for the principle and that it is impossible to upset the conclusion of the Tribunal that he was not dismissed.*

[94] The Employment Appeal Tribunal went on to dismiss the employee's claim as the employee therein had resigned voluntarily after he had agreed to satisfactory terms/offer of financial benefits. There it was held in the headnotes as follows:

> *Held: dismissing the appeal, that where an employee was threatened that if he did not resign he would be dismissed and the threat caused the resignation, that amounted to a dismissal in law; but where the resignation was brought about not by the threat of dismissal but by other factors such as the offer of financial benefits, there was no dismissal; that accordingly, since the employee had agreed satisfactory terms upon which he was prepared to resign so that the threat of dismissal was not in fact the cause of his resignation, he had not been dismissed and the industrial tribunal's decision was correct.*
>
> (emphasis added)

(ii) the claimant's request (time to consider MSS) was made and accepted by the respondent. The respondent did not force the claimant to accept the draft (MSS agreement) there and then at the first meeting (14 January 2019). Nor did the respondent issue an ultimatum at the first meeting (14 January 2019) for the claimant to accept the draft (MSS agreement) within a specified time period after the first meeting (14 January 2019). Instead, the claimant was given time by the respondent and he did take time to consider the draft (MSS agreement);

(iii) the second meeting (14 January 2019) was not requested for by the respondent. The claimant attended the second meeting (14 January 2019) on his own volition. At the second meeting (14 January 2019), the claimant's four amendments (draft MSS agreement) were proposed and accepted by the respondent. It is clear that the negotiations (draft MSS agreement) continued in the second meeting (14 January 2019);

(iv) the claimant's resignation letter did not state that the claimant was forced to accept the MSS agreement due to the respondent's threat of retrenching him. In fact, the claimant's resignation letter stated, among others, that the claimant thanked "all for the support" and wished the respondent "all the best in the future";

(v) the contents of the claimant's WhatsApp message (15 January 2019) amounted to an "admission" by the claimant under ss. 17(1), 18(1) and 21 of the EA that he had signed the MSS agreement voluntarily (claimant's admission). WhatsApp messages are admissible as evidence in legal proceedings – please refer to *Syarikat Faiza Sdn Bhd & Anor v. Faiz Rice Sdn Bhd & Anor And Another Case* [2017] CLJU 1648; [2017] 1 LNS 1648; [2019] 7 MLJ 175, at [23(1)]. The relevant parts of ss. 17(1), 18(1) and 21 of the EA are reproduced below:

> s 17. *Admission* and confession *defined*
>
> *(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.*
>
> s 18. *Admission by party to proceeding,* his agent or person interested
>
> *(1) Statements made by a party to the proceeding* or by an agent *to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.*
>
> s 21. *Proof of admissions against persons making them* and by or on their behalf
>
> *Admissions are relevant and may be proved as against the person who makes them* or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest except in the following cases:
>
> (a) an admission may be proved by or on behalf of the person making it when it is of a nature that, if the person making it were dead, it would be relevant as between third persons under section 32;

A

(b) an admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body relevant or in issue, made at or about the time when that state of mind or body existed and is accompanied by conduct rendering its falsehood improbable;

B

(c) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission. (emphasis added)

It is to be noted that the claimant's WhatsApp message (15 January 2019) was not sent at the behest of the respondent. In other words, the claimant's admission was made without any inducement by the respondent and/or COW1;

C

(vi) despite the conclusion of the MSS agreement between the claimant and respondent, the claimant's early release request was made by way of the claimant's WhatsApp message (19 January 2019). The claimant's WhatsApp message (22 January 2019) even requested for, among others, the respondent to confirm payment of the MSS sum in full despite the fact that the claimant did not serve the three months' resignation notice period. Thereafter, there was the bilateral variation (MSS agreement) and the respondent's payment of the MSS sum in full to the claimant.

D

E

This is a case where an employer had "walked the extra mile" by accommodating the claimant's early release request and paid the MSS sum in full despite the fact that the claimant did not serve the three months resignation notice period. Yet, the claimant's representation had been made in this case;

F

(vii) at all material times, the claimant did not send any demand, letter, notice, email or WhatsApp message to the respondent and/or COW1 that he had been forced to sign the MSS agreement due to a threat by the respondent (through COW1) that he would be retrenched if he did not sign the MSS agreement; and

G

(viii) the claimant was not a low-level employee of the respondent. On the contrary, the claimant was a Senior Manager of the respondent with a gross monthly salary of RM17,938. More importantly, the claimant had negotiated successfully on his own behalf (without the benefit of legal advice) with the respondent regarding the draft (MSS agreement). After the conclusion of the MSS agreement, the claimant (solely on his own efforts) managed to persuade the respondent to agree to the bilateral variation (MSS agreement).

H

I

The seniority of the claimant's position in the respondent, his "capability" with regards to the negotiations (draft MSS agreement) and the bilateral variation (MSS agreement) are clearly relevant in the IC's determination of whether the claimant can discharge the legal burden under s. 101(1) and (2) of the EA to prove that he had been forced to sign the MSS agreement under a threat that the respondent would retrench him.

[40] The failure of the learned IC Chairman and Judicial Commissioner to take into account the relevant considerations, with respect, constituted an error of law (second legal error (IC and High Court)).

Whether IC And High Court Had Taken Into Account Irrelevant Considerations

[41] In our view, both the learned IC Chairman and Judicial Commissioner had considered two irrelevant matters (irrelevant considerations) as follows:

(i) there was an "offer" or promise by the respondent to promote the claimant (promotion offer/promise).

The contents of Mr Ziegelaar's WhatsApp message did not contain any promotion offer/promise. Nor is there any oral and/or documentary evidence adduced by the claimant at the IC hearing to prove any promotion offer/promise. If there was a promotion offer/promise:

(a) any reasonable person in the claimant's senior position would have asked COW1 and/or COW2 at the first meeting (14 January 2019) regarding the promotion offer/promise, especially when the claimant was offered a draft (MSS agreement) instead of a promotion;

(b) the claimant would have used the promotion offer/promise as a bargaining tool in the negotiations (draft MSS agreement); and

(c) the claimant's admission would not have been made. Instead, the claimant would have sent a remonstrative WhatsApp message to all his colleagues in the respondent at the material time that instead of a promotion offered or promised by the respondent, he was forced to accept the MSS agreement under a threat of being retrenched; and

(ii) Ms Lim (who prepared the respondent's document (two tables)) should be called by the respondent to testify at the IC hearing regarding the contents of the respondent's document (two tables).

The IC can only draw an adverse inference against any party for failing to call a witness or tender a document as evidence in a hearing before the learned IC Chairperson under s. 114(g) of the EA. Section 114(g) of the EA states as follows:

s 114. *Court may presume existence of certain fact*

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, *human conduct, and* public and *private business, in their relation to the facts of the particular case.*

ILLUSTRATIONS

The court may presume:

…

(g) *that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;* (emphasis added)

The scope of s. 114(g) of the EA has been explained by Mohd Azmi SCJ in the Supreme Court case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, at 494, as follows:

It is essential to appreciate the scope of section 114(g) (EA) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case. (emphasis added)

According to *Munusamy*, an adverse inference can only be drawn under s. 114(g) of the EA against a party for suppressing material evidence at a hearing.

Firstly, in this case, the claimant had alleged that he was threatened by COW1 at the first meeting (14 January 2019) that if he did not accept the MSS agreement, the claimant would be retrenched by the respondent. We fail to see how the evidence of Ms Lim was relevant at the IC hearing. This is because Ms Lim was not present at the first meeting (14 January 2019). Furthermore, the claimant did not aver that Ms Lim was involved in any threat of retrenchment against him at the material time.

Secondly, the claimant could have applied to the IC for a "summons" to compel Ms Lim to give evidence at the IC hearing under s. 29(b) and (c) of the IRA read with r. 16 of the Industrial Court Rules 1967 (ICR). In other words, even if it is assumed that Ms Lim's evidence was material in this case, the claimant could have compelled Ms Lim to testify at the IC hearing. There was, therefore, no suppression of Ms Lim's evidence by the respondent in this case. We reproduce below s. 29(b), (c) of the IRA and r. 16 of the ICR:

s 29 IRA *Power of the [IC]*

The [IC] may, in any proceedings before it:

…

(b) *summon before it* the parties to any such proceedings and *any other person who in its opinion is connected with the proceedings;*

(c) *take evidence on oath* or affirmation and compel the production before it of books, papers, documents and things; …

r 16 ICR *Summons.*

A summons issued by the [IC] requiring any party or person to appear before it or to produce documents *under the provisions of paragraphs (b) and (c) of section 29 of the Act shall be in Form O.* (emphasis added)

[42] Both the learned IC Chairman and Judicial Commissioner had committed an error of law when they took into account the irrelevant considerations in this case (third legal error (IC and High Court)).

Did IC And High Court Err In Law By Deciding That Respondent's Restructuring Was Not *Bona Fide*?

[43] Both the IC and High Court had decided that the respondent's restructuring was not *bona fide*. With respect, we agree with the contention of the respondent's learned counsel that an error of law had been committed by the learned IC Chairman and Judicial Commissioner in this respect (fourth legal error (IC and High Court)). Our decision is premised on the following reasons:

(i) it is trite law that an employer has the prerogative to restructure its business in a *bona fide* manner (employer's prerogative (*bona fide* restructuring)) – please refer to the judgment of the Court of Appeal delivered by Gopal Sri Ram JCA (as he then was) in *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235; [2000] 7 MLJ 1, at 4 to 5.

In this case, the respondent's financial problems existed at the material time. This is clear from the evidence of Mr Bernard Chow Voon Liung, the respondent's Head of "Finance & Controlling" (COW3). Hence, the economic justification for the respondent's restructuring which was a lawful exercise of the employer's prerogative (*bona fide* restructuring). In other words, the respondent's offer of MSS to the claimant was not a cloak to dismiss him unlawfully under a threat of retrenching him; and

(ii) the mere fact that the claimant's functions continued to exist after the completion of the respondent's restructuring:

(a) did not *ipso facto* mean that the claimant's functions had become redundant; and

(b) did not bar the respondent from restructuring its business in an economically feasible manner wherein another employee could carry out the claimant's functions at a lower cost to the respondent.

In *Woo Vain Chan v. Malayawata Steel Bhd* [2016] 10 CLJ 176; [2016] 2 MLJ 848, at [24] to [26], Abang Iskandar JCA (as he then was) spoke on behalf of the Court of Appeal as follows:

[24] Looking at the decision of the learned HCJ [High Court Judge], we noted that the learned HCJ had spelt out the law on redundancy and she had cited the case of Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] 3 MLJ 411 and concluded that just because the duties of the respondent continued to exist does not mean that there was no redundancy. At para [5] of her grounds of judgment ('GOJ') she had quoted a portion of the decision of the court in the Stephen Bong case as follows:

> *It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind. The [IC] was right when it held that the applicant was redundant as there was reduced work and reduced business within the company which made the applicant's position as an executive director in charge of one of the groups redundant.*

[25] It was her view that redundancy would happen in a business organisation when it 'requires fewer employees to conduct the same amount of work or reduced amount of work'. Based on that statement of the law as regards redundancy, the learned HCJ proceeded to apply the same to the factual matrix before her in the JR application. This was what she had said in the same para [5] of the GOJ:

> *It was the decision of the [IC] that there was no redundancy as the duties of the respondent still very much existed at the time of termination. With due respect, the fact that the duties of the respondent continued to exist does not mean that there was no redundancy.*

[26] At the outset, we were of the considered view that there was nothing wrong with the learned HCJ's narration of the legal principle on what would amount in law to a redundancy situation. In fact the position can be considered as trite. The law reports, as well as the body of literature on the subject-matter abound and would not require us to restate what the position is. … (emphasis added)

After the completion of the respondent's restructuring, the respondent had appointed COW4 to take over the claimant's job (respondent's appointment (COW4)). As decided in *Woo Vain Chan*, notwithstanding the fact that the claimant's functions were not redundant after the respondent's restructuring, the respondent's appointment (COW4) was made in good faith because:

(1) the respondent's financial problems had been proven by way of COW3's evidence;

(2) compared to the claimant (who joined the respondent on 1 June 2015), COW4 was more senior in the respondent's employment because COW4 commenced work in the respondent with effect from 4 August 2014. The respondent's appointment (COW4) was therefore made in accordance with the principle "last in, first out";

(3) in the respondent, COW4 (a Senior Manager with the respondent) was of a similar rank as the claimant. In other words, the respondent did not appoint an employee of a lower rank than the claimant to replace the claimant after the completion of the respondent's restructuring; and

(4) premised on COW4's resume, COW4 had the necessary work experience and skill set to take over the claimant's functions.

[44] In any event, the relevant considerations prove on a balance of probabilities that the claimant had voluntarily agreed to the MSS agreement – please refer to the above para. 39. As such, once the claimant has failed to discharge the legal burden to prove the forced MSS contract (retrenchment threat) on a balance of probabilities, the claim should have been dismissed by the learned IC Chairman on this ground alone.

Was Award "Irrational"?

[45] Regrettably, we are of the view that if all the relevant considerations had been taken into account, no reasonable IC Chairperson would have made the award. Accordingly, the award is irrational in the sense that no reasonable IC Chairperson would have made the award (irrational award).

Can High Court Apply "Plainly Wrong" Test In A Judicial Review Application?

[46] The learned Judicial Commissioner had applied the "plainly wrong" test in the respondent's judicial review application.

[47] The High Court's appellate jurisdiction is different from its supervisory jurisdiction by way of judicial review. In an appeal to a higher court from a lower court's finding(s) of fact, the higher court can only set aside a lower court's factual finding(s) if the lower court has committed "plain error(s)" with regards to those finding(s) of fact – please refer to the Federal Court's judgment delivered by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67, at [33] and [34].

In a judicial review application of an award of the IC, the High Court can only issue an order of *certiorari* to quash the award in the following three "categories":

(i) the learned IC Chairperson has committed a procedural impropriety;

(ii) an error of law has been committed by the IC; and

(iii) the award is irrational or unreasonable in the sense that no reasonable IC Chairperson would have made the award.

Conclusion

[48] Premised on:

(i) the first to fourth legal errors (IC and High Court); and

(ii) the fact that an irrational award had been made in this case:

This appeal is allowed with the following order:

(a) the High Court's decision is set aside;

(b) a *certiorari* order is issued to quash the award; and

(c) the claimant shall pay costs of RM20,000 to the respondent for proceedings in the Court of Appeal and High Court (subject to allocatur fee).

[49] In closing, an IC Chairperson should be wary in deciding a claim for an unlawful dismissal (in the form of a forced resignation) by an employee, who had willingly entered into a negotiated MSS contract with an employer and had received all the benefits under the concluded MSS contract.